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State v. Clements Appellant's Reply Brief Dckt. 35665

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IN THE SUPREME COURT OF THE STATE OF IDAHO

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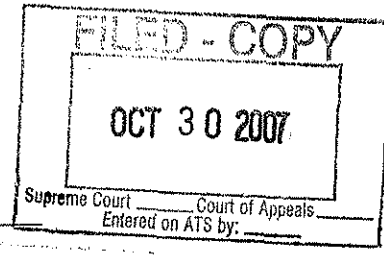
STATE OF IDAHO,)

Plaintiff-Appellant-Cross
Respondent,)

NO. 33481

vs.)

MICHAEL CLEMENTS,
Defendant-Respondent-Cross
Appellant.)



**REPLY BRIEF OF APPELLANT
RESPONSE BRIEF OF CROSS RESPONDENT**

**APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BONNEVILLE**

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District Judge**

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STATEMENT OF THE CASE

Nature of the Case

The state has appealed the district court's ruling that Clements's sentence for attempted second-degree murder was illegal because it was enhanced by a weapons enhancement. Clements has cross-appealed the district court's ruling that his sentence for second-degree murder, also enhanced with a weapons enhancement, was legal.

Statement of the Facts and Course of the Proceedings

Clements pled guilty to second-degree murder with a weapons enhancement and attempted second-degree murder with a weapons enhancement, both charges reduced from first-degree, pursuant to a plea agreement, in which the state also dismissed additional felony charges and the parties agreed the sentences would run concurrently. (#22492 R., vol. II, pp. 238-41.) More than ten years after entry of judgment, Clements filed a motion to correct an illegal sentence, claiming he could be legally subjected to only one weapons enhancement. (R., p. 15.) The district court reopened the case, found that the state's evidence to support the imposition of both enhancements was insufficient, and granted the motion by vacating and re-sentencing on the attempted murder count. (R., pp. 34-46.) The state timely appealed. (R., pp. 68-71.)

ISSUES

The issue on appeal is:

Did the district court lack jurisdiction to re-examine the facts of the underlying crimes to which Clements pled guilty over ten years previously, to determine if Clements had a defense to one of the enhancements?

(Appellant's brief, p. 3.)

The issue on cross-appeal has been presented as:

Did the district court err after finding that the imposition of the two enhancements was illegal and, therefore, the sentences were void, to invalidate only one sentence and to leave the other sentence valid?

(Respondent's brief, p. 5.)

The state rephrases the issue on cross-appeal as:

Is the issue on cross-appeal moot because the district court had no jurisdiction to make *factual findings on a defense* that was necessarily waived by entering a guilty plea and therefore erred in finding even one of the sentences illegal? In the alternative, has Clements failed to show that striking down both sentences for the two crimes he was convicted of was the proper remedy where only one of the enhanced sentences, by definition, was even claimed to be illegal?

ARGUMENT

I.

The District Court Lacked Jurisdiction To Make Factual Findings On A Defense That Should Have Been Asserted Prior To Entering A Guilty Plea

A. Clements's Claim That The Court Had Jurisdiction To Review The Sufficiency Of The Evidence Under Rule 35 Is Without Merit

In order to grant the Rule 35 motion the district court re-opened the ten-year closed case, made factual findings on a statutory defense, and then declared the enhancement of one sentence “illegal” after concluding that the state’s evidence presented at the preliminary hearing was insufficient to support imposition of more than one enhancement. (R., pp. 34-46.) Because Rule 35 allows review of only the legal question of legality of a sentence, and did not grant the district court authority to conduct additional fact-finding about the underlying circumstances of the crime or the sufficiency of the state’s evidence, the district court acted beyond the scope of its jurisdiction.

Idaho Criminal Rule 35 allows for the correction of an illegal sentence, “at any time.” The question of whether a sentence is illegal under Rule 35 is a question of law over which the appellate court employs free review. State v. Farwell, ___ Idaho ___, ___ P.3d ___, 2007 WL 3052874 (Idaho, Oct. 22, 2007) (“Generally, whether a sentence is illegal or whether it was imposed in an illegal manner is a question of law, over which we exercise free review.”); State v. Harvey, 142 Idaho 727, 729, 132 P.3d 1255, 1256 (Ct. App. 2006) (“the question of whether the sentence imposed is illegal is a question of law freely reviewable by the appellate court”).

In arguing in support of the district court's actions, however, Clements concedes that the applicability of I.C. § 19-2520E's bar against multiple enhancements in this case is not a legal question, but is instead "a factual question." (Respondent's brief, pp. 8-9, citing State v. Custodio, 136 Idaho 197, 207-08, 30 P.3d 975, 985-86 (Ct. App. 2001), and State v. Johns, 112 Idaho 873, 881-82, 736 P.2d 1327, 1335-36 (1987).) He then argues that a court addressing a Rule 35 motion claiming an illegal sentence ten years after a guilty plea has the same duty it would have upon a challenge brought immediately after a jury trial – review the record for sufficiency of evidence showing the two enhanced crimes were not part of an indivisible course of conduct under I.C. § 19-2520E. (Respondent's brief, p. 10.) By Clements's own admission, and the cases he cites in argument, application of I.C. § 19-2520E is a factual question, not the legal question of whether a sentence is legal.

That the issue before the district court was a factual question, and not the legal question of the legality of the sentence that may be brought under Rule 35, is shown by the cases Clements relies on. In all the cases where the court held that I.C. § 19-2520E barred more than one enhancement the defendant went to trial and the question of whether the evidence supported two enhancements was based upon findings of fact adduced from the evidence presented at the trial. See State v. Johns, 112 Idaho 873, 882, 736 P.2d 1327, 1336 (1987); State v. Custodio, 136 Idaho 197, 207-08, 30 P.3d 975, 985-86 (Ct. App. 2001). In State v. McLeskey, 138 Idaho 691, 696-97, 69 P.3d 111, 116-17 (2003), the Idaho Supreme Court held that the district court erred in dismissing an enhancement

charge before the case went to trial. Thus, the case-law applying I.C. § 19-2520E establishes that the bar of I.C. § 19-2520E comes into play only if the evidence *adduced at trial* demonstrates that multiple enhancements are being applied to an indivisible course of conduct.¹

In the underlying case it was not improper to charge multiple enhancements, even if the evidence ultimately would have shown a divisible course of conduct. McLeskey, 138 Idaho at 696-97, 69 P.3d at 116-17. Likewise, nothing made it “illegal” for Clements to waive his chances that the evidence at trial would demonstrate an indivisible course of conduct in order to take advantage of a plea agreement that involved the dismissal of additional felony charges.

The district court thus essentially made the same error as the district court did in McLeskey, which was to dismiss an enhancement on the basis of insufficient evidence when there had been no trial at which evidence had been presented. The court simply had no jurisdiction to evaluate the sufficiency of the state’s evidence to support application of two enhancements after Clements pled guilty to both.

Clements’s acknowledgement -- which was required by a review of the applicable case-law -- that application of I.C. § 19-2520E requires factual findings

¹ That questions of illegality are legal ones whereas the question here presented is a factual one is also demonstrated by review of State v. Kerrigan, 143 Idaho 185, 141 P.3d 1054 (2006). In that case Kerrigan challenged the district court’s *legal* authority to enhance a single sentence with two enhancements. Id. at 187, 141 P.3d at 1056. In contrast, Clements challenged whether the *facts* allow two enhancements for two convictions.

demonstrates the error of the district court. Rule 35 grants jurisdiction only to review the legal question of whether the sentence imposed was legal. Rule 35 conferred no jurisdiction on the court, after entry of a guilty plea, much less ten years later, to evaluate the factual basis supporting the plea to, and imposition of, two enhancements. The district court's order finding the second enhancement illegal on the basis of insufficient evidence must therefore be vacated.

B. Clements's Argument That The Record Is Inadequate Is Without Merit

Clements next argues that the state failed to provide an adequate appellate record for review of its claim of error. (Respondent's brief, pp. 11-12.) Specifically, Clements argues that the state failed to provide a transcript of the change of plea hearing. (Id.) This argument misapprehends both the state's argument and the nature of appellate process.²

It is the appellant's responsibility to provide an adequate record to substantiate his claims on appeal. State v. Mowery, 128 Idaho 804, 805, 919 P.2d 333, 334 (1996); State v. Beason, 119 Idaho 103, 105, 803 P.2d 1009, 1011 (Ct. App. 1991); State v. Murinko, 108 Idaho 872, 873, 702 P.2d 910, 911 (Ct. App. 1985). In the absence of an adequate record to support the appellant's claims, the court will not presume error. Beason, 119 Idaho at 105, 803 P.2d at 1011; Murinko, 108 Idaho at 873, 702 P.2d at 911.

The state has presented an adequate record to substantiate its claims. The state claims that as a *matter of law* a district court does not have jurisdiction

² The state filed, on October 17, 2007, a motion to augment the record with this transcript.

to re-open a final judgment and engage in a fact-finding expedition to find out whether the state had sufficient evidence to support a second enhancement. State v. Farwell, ___ Idaho ___, ___ P.3d ___, 2007 WL 3052874 (Idaho, Oct. 22, 2007) (“Generally, whether a sentence is illegal or whether it was imposed in an illegal manner is a question of law, over which we exercise free review.”); State v. Harvey, 142 Idaho 727, 729, 132 P.3d 1255, 1256 (Ct. App. 2006) (“the question of whether the sentence imposed is illegal is a question of law freely reviewable by the appellate court”). The state has presented a perfectly adequate record to support its allegations that the district court did not address a legal question but instead delved into the factual basis for the pleas, and therefore exceeded its jurisdiction.

Clements claims that “the change of plea transcript is presumed to support the district court’s conclusion that Mr. Clements did not waive the prohibition against the district court imposing multiple enhancements for crimes arising out of the same indivisible course of conduct.” (Respondent’s brief, p. 11.) This claim makes no citation to the record. Review of the district court’s decision shows that this claim actually misrepresents the record. What the district court determined was that a criminal defendant may not waive his right to challenge an illegal sentence as a matter of law. (R., p. 42.) The presence or absence of a transcript has no bearing on the legal question of whether a court has jurisdiction to determine the sufficiency of the evidence supporting a charge to which the defendant has pled guilty.

In addition, even without the transcript of the guilty plea hearing the facts admitted by Clements are set forth in the record. He pled guilty to the charges and counts set forth in an amended information by virtue of a plea agreement. (#22492 R., vol. II, pp. 238-45.) A copy of the amended information was actually attached to the agreement as Exhibit A. (R., pp. 238, 242-43.) The facts he admitted through his guilty plea were therefore that he shot two people on the same date in the same county – nowhere did the state allege an indivisible course of conduct, or even that the shootings were in the same location (other than in the same county) or near the same time (other than on the same day). Nowhere in that agreement did Clements reserve the right to claim that the murder and the attempted murder were committed in the same indivisible course of conduct, and in fact acknowledged that the written agreement was the whole agreement of the parties. (See #22492 R., vol. II, p. 239 (no other understanding than contained in plea agreement).) The record on appeal affirmatively disproves Clements's claim that the transcript would have shown that Clements in fact preserved his right to assert an affirmative defense against the enhancements he was pleading guilty to; such a claim is directly contrary to the specific terms of the plea agreement.

Because the question in this case is a legal one – whether a district court may, after entry of plea and judgment, reopen a factual inquiry into the sufficiency of the state's evidence to show the defendant did not commit the two crimes in an indivisible course of conduct – lack of a transcript of the guilty plea does not make the record incomplete.

C. Clements's Argument That He Did Not Admit The Crimes Were Not Committed In An Indivisible Course Of Conduct Is Without Merit

Clements next argues that because the record does not reflect that he specifically admitted a divisible course of conduct, his sentences were illegal. (Respondent's brief, pp. 12-14.) The state notes that the record does not reflect that Clements admitted the murder and attempted murder were not in self defense either. However, the defendant, as a *matter of law*, waives defenses to the charges he admits through a knowing and voluntary guilty plea. State v. Al-Kotrani, 141 Idaho 66, 69, 106 P.3d 392, 395 (2005) (quoting Clark v. State, 92 Idaho 827, 832, 452, P.2d 54, 59 (1969)). The district court had no jurisdiction to relieve Clements of this waiver, and determine the sufficiency of the state's evidence, ten years after conviction.

II.

Clements's Contention That Both Of His Sentences Were Illegal Is Without Merit

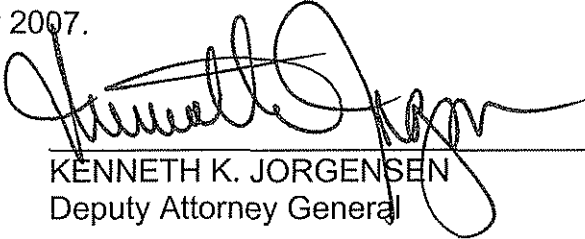
Clements argues on cross-appeal that because two enhancements were imposed, both his sentences were "void." (Respondent's brief, pp. 14-16.) He acknowledges that his argument is contrary to existing authority. (Id. at p. 15, citing State v. Custodio, 136 Idaho 197, 208, 30 P.3d 975, 986 (Ct. App. 2001).) In addition, his argument ignores the very language of the statute in question: "any person convicted of two (2) or more substantive crimes provided for in the above code sections, which crimes arose out of the same indivisible course of conduct, may only be subject to one (1) enhanced penalty." I.C. § 19-2520E. Obviously one enhancement was perfectly legal; Clements's argument that they

were both somehow "void" where only one of the two enhancements was illegal is without legal or logical merit.

CONCLUSION

The state respectfully requests this Court to reverse the district court's order declaring the sentence illegal and reinstate the sentence, as enhanced, for attempted murder.

DATED this 30 day of October 2007.

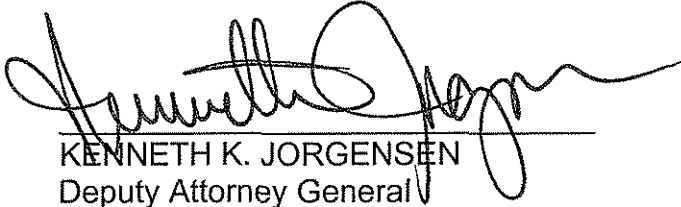

KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 30th day of October 2007 served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

DIANE M. WALKER
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.


KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/pm